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ADVISORY SERVICES AND TECHNICAL COOPERATION
IN THE FIELD OF HUMAN RIGHTS

Situation of human rights in Cambodia

Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr. Thomas Hammarberg, submitted in accordance with Commission resolution 1998/60

Report of the Secretary-General

Addendum

1. The Group of Experts on the crimes committed during the Khmer Rouge regime from 1975-1979 submitted its report to the Secretary-General on 22 February 1999. The Group, which had been appointed by the Secretary-General pursuant to General Assembly resolution 52/135, consisted of Sir Ninian Stephen, Mr. Rajsoomer Lallah and Professor Steven Ratner. Its mandate was to evaluate the existing evidence in order to determine the nature of the crimes committed by Khmer Rouge leaders in the years 1975-1979; to assess the feasibility of their apprehension; and to explore legal options for bringing them to justice before an international or national jurisdiction.

2. The Group concluded that the evidence gathered to date testifies to the Commission of serious crimes under both international and Cambodian law and that sufficient evidence exists to justify legal proceedings against Khmer Rouge leaders for these crimes. The crimes included crimes against humanity, genocide, war crimes, forced labour, torture, crimes against internationally protected persons, as well as crimes under Cambodian law.

3. The Experts reported that the feasibility of apprehending Khmer Rouge leaders depends on the ability and the willingness of the Government, in whose territory suspects are located, to arrest or extradite them. They concluded that the Cambodian Government is able to apprehend Khmer Rouge leaders in its

territory whose whereabouts are known and who are not protected physically from arrest. At their meeting in November 1998 with Prime Minister Hun Sen, he had expressed the Government's willingness and readiness to apprehend any person indicted by an independent prosecutor of a tribunal. Similar expressions of willingness had been made by the Government of Thailand.

4. The Group of Experts analysed the following legal options for bringing to justice Khmer Rouge leaders: a tribunal established under Cambodian law in a domestic court; a tribunal established by the Security Council or the General Assembly as an ad hoc international tribunal; a hybrid option of a Cambodian tribunal under United Nations administration; an international tribunal established by a multilateral treaty and with trials held in other States.

5. Having considered these options, the Experts recommended that the United Nations, in response to the request of the Cambodian Government, should establish an ad hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide committed between 17 April 1975 and 7 January 1979. They recommended that the Security Council establish the tribunal or, should it not do so, that the General Assembly establish it. They also proposed that the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and of the International Tribunal for Rwanda serve as the prosecutor of the new tribunal, with a deputy prosecutor specifically charged with responsibility for the Cambodia tribunal.

6. The Experts furthermore recommended that the tribunal, including the office of the deputy prosecutor, be established in a State in the Asian-Pacific region other than Cambodia; that the prosecutor establish an investigations office in Cambodia; and that the United Nations, in cooperation with the Cambodian Government, arrange for the unfettered dissemination of the proceedings in Cambodia by radio and television.

7. They also recommended that, as a matter of prosecutorial policy, the prosecutor limit his or her investigations to those persons most responsible for the most serious violations of international human rights law. This would include senior leaders with responsibility over the abusers as well as those at lower levels who are directly implicated in the most serious atrocities. The Experts emphasized that the list of top governmental and party officials in Democratic Kampuchea might not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from the decision-making chain of command and knowledge withheld from them, while others not appearing in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true, the Experts noted, with respect to certain leaders at the zone level, as well as officials of torture and interrogation centres such as Tuol Sleng. The Experts recommended that the prosecutor exercise his or her discretion regarding investigations, indictments and trials, taking fully into account the twin goals of individual accountability and national reconciliation in Cambodia.

8. Another recommendation was that the United Nations, in cooperation with the Cambodian Government and the non-governmental sector, should encourage a process of reflection among Cambodians to determine the desirability and, if

appropriate, the modalities of a truth-telling mechanism to provide a fuller picture of the atrocities committed during the period of Democratic Kampuchea.

9. The report of the Group of Experts was conveyed to the Permanent Mission of Cambodia to the United Nations on 23 February. A first response from the Government came in a letter to the Secretary-General which said, in part:

> "We have never rejected the accountability of the Khmer Rouge leaders for the crimes of genocide in Cambodia. We just want, however, to caution that any decision to bring the Khmer Rouge leaders to justice must also take into full account Cambodia's need for peace, national reconciliation, rehabilitation and economic development for poverty reduction. Therefore, if improperly and heedlessly conducted, the trials of Khmer Rouge leaders would panic other former Khmer Rouge officers and rank and file, who have already surrendered, into turning back to the jungle and renewing the guerrilla war in Cambodia."

The letter also said that the Government was studying the South African Truth and Reconciliation Commission as a possible model for Cambodia.

10. These points were reiterated in a meeting between the Minister for Foreign Affairs and International Cooperation, Hor Nam Hong, and the Special Representative in Phnom Penh on 4 March. On 6 March, Ta Mok, the former Khmer Rouge military commander of the south-west region, was arrested in northern Cambodia and brought to a detention centre in Phnom Penh.

11. The Foreign Minister met the Secretary-General in New York on 12 March. During the meeting he handed over an aide-mémoire which made reference to the fact that Democratic Kampuchea had been allowed to occupy the Cambodian seat in the United Nations until the signing of the Paris Peace Accords in 1991. It also pointed out that the Khmer Rouge had been legitimized through the Accords and had sat in the Supreme National Council during the transition period.

12. The Foreign Minister told the Secretary-General that, on the basis of article VI of the Convention on the Prevention and Punishment of the Crime of Genocide and article 33 of the Cambodian Constitution, the Cambodian courts were fully competent to conduct any trial of Khmer Rouge leaders. He noted that the criminals are Cambodians, the victims were Cambodians and the crimes were committed in Cambodia. Ta Mok would be tried in a Cambodian court under Cambodian law.

13. The Secretary-General transmitted the report of the Group of Experts by letters dated 15 March to both the General Assembly and the Security Council (A/53/850 - S/1999/231). In so doing, the Secretary-General expressed his own view that Khmer Rouge leaders responsible for the most serious of crimes should be brought to justice and tried before a tribunal which meets international standards of justice, fairness and due process of law. He said that impunity is unacceptable in the face of genocide and other crimes against humanity.

14. The Secretary-General emphasized that if such standards are to be met, the tribunal must be international in character. This did not necessarily

mean that it should be modelled after the existing ad hoc tribunals or linked to them; other options could be explored taking into account the analysis and conclusions of the Group of Experts. He also underlined that the success of any international tribunal presupposes full cooperation of the Cambodian Government.

15. The Special Representative had another meeting with Prime Minister Hun Sen on 25 March. Others present included the Foreign Minister, the Minister of Justice, Uk Vithun, the Senior Minister, Sok An, and the President of the Supreme Court, Dith Munthy. Before the meeting another letter sent to the Secretary-General was published which again made reference to article 33 of the Constitution and article VI of the Genocide Convention. That letter stated that the trial of Ta Mok would be conducted before a national tribunal; if invited by the tribunal, legal experts from foreign countries would be welcome. The court would also decide whether others would also be tried.

16. The Special Representative mentioned during the meeting that legal experts he had consulted had an interpretation that differed from the Government's concerning the implications of article 33 of the Constitution: in their view, article 13 appeared not to preclude cooperation with an international tribunal outside Cambodia. The full article reads: "Cambodian nationals shall not be deprived of their Cambodian nationality, exiled or arrested and extradited to any foreign country unless there is a mutual agreement." The Special Representative suggested that such mutual agreement would not be a problem if an international tribunal were properly established and the Cambodian authorities actively involved.

17. Prime Minister Hun Sen stated that there would be no international tribunal, outside or within Cambodia, and that Cambodian law did not allow for the participation of foreigners as judges or prosecutors. Advisers from some countries might be accepted; it would be up to the prosecutor to decide on this. Governments interested in supporting the trials could communicate with the Ministry for Foreign Affairs or the Ministry of Justice.

18. This position appeared to contradict the original request for international assistance contained in a letter to the Secretary-General from then First Prime Minister Norodom Ranariddh and Second Prime Minister Hun Sen on 21 June 1997 (see the annex to the main report). The letter had asked for "the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979". The letter also stressed that Cambodia did not have the resources or expertise to conduct this very important procedure.

19. The latter problem was analysed by the Group of Experts. They concluded that the Cambodian judiciary failed to meet three essential conditions: a trained cadre of judges, lawyers and investigators; an adequate infrastructure; and a culture of respect for due process. These deficiencies are, at least in part, a result of the mass killings during the Khmer Rouge regime which badly undermined the judicial system.

20. In the opinion of the Special Representative, the problems relating to the judicial system are so manifest that they cannot be quickly remedied for

the purpose of a trial of this magnitude through the injection of international financial and personnel assistance. Though the need for radical judicial reform has been a leading theme in the reports of the Special Representative, such a process will take considerable time. The Government's platform for 1998-2003 emphasizes the need for judicial reform, stating that "the judicial system and the courts [must] be entirely overhauled. By law they ought to be independent, honest and trustworthy".

21. The Special Representative considers that only an international tribunal can guarantee international standards of justice, fairness and due process of law. The establishment of a tribunal of an international character does not necessarily mean that it should be modelled after either of the existing ad hoc tribunals or linked to them institutionally, administratively or financially.

22. The Experts proposed that the tribunal be located in the Asian-Pacific region but outside Cambodia, and identified problems in relation to other locations. On condition that such problems can be resolved, there would be advantages to establishing the international tribunal in Cambodia. It would, for instance, enable the Cambodian population to observe the proceedings closely and to see clearly that justice is being done.

23. In its discussions with the Special Representative the Cambodian Government has pointed at the problem of slow international decision-making in matters such as this. This is a valid point and can only be convincingly responded to through firm commitments from the international community to provide prompt and continuous assistance so that those responsible can be properly tried. However, such commitments are unlikely to be forthcoming as long as the Cambodian Government does not demonstrate in an unequivocal manner its desire to have justice done, and seen to be done.

24. The Government's argument that arrests and trials might cause unrest should be taken seriously, even if it appears to be contradicted by the official assertion that the Khmer Rouge is now finally defeated. The Experts looked carefully into this problem and constructed their recommendations so as to take into account the need for both individual accountability and national reconciliation.

25. The Special Representative has received no report of protests following the arrest of Ta Mok. His own consultations in Cambodia have convinced him that Cambodians are ready for trials which would bring the Khmer Rouge leaders to justice and would welcome them, as long as they meet essential principles of justice. Indeed, the absence of proper proceedings at this stage, when the issue at long last has been brought into the open, could cause further polarization in Cambodian society.

26. A trial which would meet strict international standards of justice, fairness and due process of law - and be recognized as meeting them - is an obligation to the victims and the survivors. It would also be an immensely important contribution to breaking the cycle of impunity in Cambodia. For that purpose, other measures are also needed, as spelled out in the reports of the Special Representative. However, nothing could be as important to the creation of a culture of justice in Cambodia as a properly conducted trial of those responsible for the genocide and other crimes against humanity committed during the Khmer Rouge rule.